IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DENISE R. HITE,	*	
	*	4:03-cv-90174
Plaintiff,	*	
	*	
v.	*	
	*	
VERMEER MANUFACTURING CO. and RICK LEEDOM,	*	
	*	PRELIMINARY JURY INSTRUCTIONS
Defendants.	*	
	*	

TABLE OF CONTENTS

NO. 13–Duty to Deliberate

PRELIMINARY INSTRUCTION NO. 1
PRELIMINARY INSTRUCTIONS

Ladies and gentlemen: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial I will give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions – both those I give you now and those I give you later – are equally binding on you and must be followed. In considering these instructions, the order in which they are given is not important.

PRELIMINARY INSTRUCTION NO. 2
STATEMENT OF THE CASE

The following brief summary of the case is not to be considered evidence or proof of any facts or events in the case. It simply informs you of the factual disputes between the parties.

This is a civil case brought by Plaintiff, Denise Hite, against Defendants, Vermeer Manufacturing and Rick Leedom.

Denise Hite worked for Defendant Vermeer Manufacturing from December 15, 1997, until she was terminated on August 28, 2001. Defendant Rick Leedom was her supervisor during the relevant time frame. Plaintiff alleges that after exercising her right under the Family and Medical Leave Act ("FMLA") to take leave from her job, Defendants retaliated against her. She also alleges that Defendants retaliated against her and fired her because she complained of disability discrimination and retaliation for using FMLA leave. Defendants deny that they acted illegally. Plaintiff asserts Defendants' actions caused her damages.

Defendants denies they retaliated against Plaintiff. Defendants allege Plaintiff was terminated from her position at Vermeer Manufacturing for lawful reasons. Finally, Defendants denies they caused any damages to Plaintiff.

You must not consider this summary as proof of any claim. You and you alone will decide what the facts are from the evidence presented at trial. You also will apply the law which I will give to you in these preliminary and final instructions.

PRELIMINARY INSTRUCTION NO. 3
DUTY OF JURORS

It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are and then apply those facts to the law which I will give you in these preliminary instructions, any instructions given during the trial, and in the final instructions at the conclusion of the case. You will then deliberate and reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the parties. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I will give it to you.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Individuals, such as Ms. Hite and Mr. Leedom, and corporations, such as Vermeer Manufacturing Company, stand equal before the law, and are entitled to the same fair consideration by you. The mere fact that Vermeer Manufacturing Company is a corporation, and not an individual, does not mean that it is entitled to any greater or lesser consideration by you.

However, when a corporation is involved, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of the corporation may bind the corporation by the acts and declarations made while acting within the scope of the authority delegated to the employee by the corporatoin, or within the scope of the employee's or agent's duties as an employee or agent of the corporation.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

PRELIMINARY INSTRUCTION NO. 4
ORDER OF TRIAL

Before I give you further instructions, let me tell you how this trial will proceed.

First, the Plaintiff's attorney will make an opening statement. Next, the Defendants' attorney will make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

The Plaintiff will then present evidence and witnesses and the Defendants may cross-examine. Following the Plaintiff's case, the Defendants may present evidence and witnesses and the plaintiff may cross-examine. Following the Defendants' case, the Plaintiff may take further opportunity to present additional evidence.

After the presentation of evidence is completed, I will give you the final instructions on the law that you are to apply in reaching your verdict. The attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. I will then give you some final instructions on deliberations. After that you will retire to deliberate on your verdict.

PRELIMINARY INSTRUCTION NO. 5
DEFINITION OF EVIDENCE

You shall base your verdict only upon the evidence, these instructions, and other instructions that I may give you during trial.

"Evidence" is:

1. Testimony in person or testimony previously given, which includes depositions or videotaped depositions.
2. Exhibits admitted into evidence by the court.
3. Stipulations, which are agreements between the parties.
4. Any other matter admitted into evidence.

Evidence may be direct or circumstantial. The law makes no distinction between the weight to be given to direct and circumstantial evidence. The weight to be given any evidence is for you to decide.

The following are not evidence:

1. Statements, arguments, questions and comments by lawyers are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I shall tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

PRELIMINARY INSTRUCTION NO. 6
CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness' intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

You may hear testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinions on matters in that field and the reasons for their opinions. Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Also, an expert witness may be asked to assume certain facts are true and to give an opinion based on that assumption. This is called a hypothetical question. If any facts assumed in the question are not proved by the evidence, you should decide if that omission affects the value of the expert's opinion.

PRELIMINARY INSTRUCTION NO. 7
STIPULATED FACTS

The Plaintiff and Defendants have agreed or "stipulated" to certain facts and have reduced these facts to a written agreement or stipulation. Any counsel may, throughout the trial, read to you all or a portion of the stipulated facts. You should treat these stipulated facts has having been proved.

PRELIMINARY INSTRUCTION NO. 8
DEPOSITIONS

Certain testimony from a deposition may be read into evidence or played from a videotape. A deposition is testimony taken under oath before the trial and preserved in writing or on videotape. Consider that testimony as if it had been given in court.

PRELIMINARY INSTRUCTION NO. 9
INTERROGATORIES

During this trial, you may hear the word "interrogatory." An interrogatory is a written question asked by one party of another, who must answer it under oath and in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

PRELIMINARY INSTRUCTION NO. 10
OBJECTIONS

From time to time during the trial I may be called upon to make rulings of law on objections or motions made by the lawyers. It is the duty of the lawyer for each party to object when another party offers testimony or other evidence that the lawyer believes is not properly admissible. You should not show prejudice against a lawyer or the party the lawyer represents because the lawyer has made objections. You should not infer or conclude from any ruling or other comment I may make that I have any opinions on the merits of the case favoring one side or the other. Also, if I sustain an objection to a question that goes unanswered by the witness, you should not draw any inferences or conclusions from the question itself.

PRELIMINARY INSTRUCTION NO. 11
BENCH CONFERENCES

During the trial it may be necessary for me to talk with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

PRELIMINARY INSTRUCTION NO. 12
NOTE-TAKING

If you want to take notes during the trial, you may. However, it is difficult to take detailed notes and pay attention to what the witnesses are saying. If you do take notes, be sure that your note-taking does not interfere with listening to and considering all the evidence. Also, if you take notes, do not discuss them with anyone before you begin your deliberations. Do not take your notes with you at the end of the day. Be sure to leave them on your chair in the courtroom. The court attendant will safeguard the notes. No one will read them. The notes will remain confidential throughout the trial and will be destroyed at the conclusion of the trial.

If you choose not to take notes, remember it is your own individual responsibility to listen carefully to the evidence. You cannot give this responsibility to someone who is taking notes. We depend on the judgment of all members of the jury; you must all remember and consider the evidence in this case.

Whether or not you take notes, you should rely on your own memory regarding what was said. Your notes are not evidence. A juror's notes are not more reliable than the memory of another juror who chooses to consider the evidence carefully without taking notes.

You will notice that we do have an official court reporter making a record of the trial. However, we will have not typewritten transcripts of this record available for your use in reaching your verdict.

PRELIMINARY INSTRUCTION NO. 13
BURDEN OF PROOF

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. Plaintiff Denise Hite has the burden of proving her claims by the greater weight of the evidence. During this trial, you may also hear Plaintiff's burden of proof described as "by a preponderance of the evidence." To prove something by the greater weight, or by a preponderance of the evidence, is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, then you must conclude that issue has not been proved.

The "greater weight of the evidence" is not necessarily determined by the greater number of witnesses or exhibits a party has presented. The testimony of a single witness that produces a belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony. This is so, even though a number of witnesses may have testified to the contrary, if after consideration of all of the evidence in the case, you hold a greater belief in the accuracy and reliability of that one witness.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. That standard does not apply in civil cases such as this. You should, therefore, put that standard out of your minds.

PRELIMINARY INSTRUCTION NO. 14
ADMONITION

To ensure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it until the trial has ended and your verdict has been accepted by me. If someone should try to talk to you about the case during the trial, please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case - you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side - even if it is simply to pass the time of day - an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, remember it is because they are not supposed to talk or visit with you either.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. In fact, until the trial is over I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case, you will know more about the matter than anyone will learn through the news media.

Sixth, do not do any research or make any investigation about the case on your own.

Seventh, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

FINAL INSTRUCTION NO. 1

EXPLANATORY

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of, and during, trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. Again, all instructions, whenever given and whether in writing or not, must be followed.

FINAL INSTRUCTION NO. 2

JUDGE'S OPINION

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

During this trial I may have asked questions of witnesses or the lawyers in order to clarify certain matters. Do not assume that I hold any opinion on the matters to which my questions related.

FINAL INSTRUCTION NO. 3

AGENTS

An organization such as a corporation acts only through its agents or employees. Any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of his or her duties as an employee of the corporation.

FINAL INSTRUCTION NO. 4

FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act entitles eligible employees to take up to 12 workweeks of unpaid leave because of a serious health condition that makes the employee unable to perform the functions of her position. The law prohibits employers from interfering with or retaliating against employees who exercise or attempt to exercise their rights under the FMLA.

The FMLA permits employees to take "intermittent leave." "Intermittent leave" means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time.

FINAL INSTRUCTION NO. 5

RETALIATION FOR EXERCISE OF FMLA: ESSENTIAL ELEMENTS

Your verdict must be for the Plaintiff and against Defendants if all of the following elements have been proved by the greater weight of the evidence:

First, Plaintiff gave Defendants appropriate notice of her need to be absent from work;

Second, Defendants took adverse employment action against Plaintiff;

Third, Plaintiff's FMLA absences from work were a motivating factor in Defendants' decision to take the adverse employment action.

However, your verdict must be for the Defendants if any of the above elements has not been proved by the greater weight of the evidence.

FINAL INSTRUCTION NO. 6

ADVERSE EMPLOYMENT ACTION

As used in these instructions, adverse employment action refers to tangible changes in duties or working conditions that result in a material employment disadvantage. It includes actions such as termination, cuts in pay or benefits, and changes that affect an employee's future career prospects, or disadvantage or interfere with the employee's ability to do his or her job. It may also include a transfer to a less desirable position because that position afforded little opportunity for salary increases or advancement. It does not include mere inconvenience, an alteration of job responsibilities or loss of status and prestige when salary and position remain the same.

FINAL INSTRUCTION NO. 7

MOTIVATING FACTOR

As used in these instructions, Plaintiff's exercise of her rights under the FMLA was a "motivating factor," if Plaintiff's exercise of FMLA rights played a role in the Defendants' decision to take an adverse employment action against the Plaintiff. However, Plaintiff's exercise of FMLA rights need not have been the only reason for Defendants' decision to take an adverse employment action against Plaintiff.

FINAL INSTRUCTION NO. 8

SAME DECISION

If you find in favor of Plaintiff under Instruction 5, then you must answer the following question in the verdict forms: Have Defendants proved by the greater weight of the evidence that Defendants would have taken the adverse employment action against the Plaintiff even if Defendants had not considered Plaintiff's use of FMLA leave?

FINAL INSTRUCTION NO. 9

PRETEXT

Defendants contend that any decisions concerning Plaintiff's employment were made for legitimate nondiscriminatory reasons that had nothing to do with Plaintiff's FMLA leave. You must consider the reasons given by the Defendants for their actions and determine whether Plaintiff has proven that the reasons given were a pretext or cover-up for unlawful retaliation.

FINAL INSTRUCTION NO. 10

BUSINESS JUDGMENT

You may not return a verdict for Plaintiff just because you might disagree with defendants' decisions or believe them to be harsh or unreasonable.

FINAL INSTRUCTION NO. 11
ACTUAL DAMAGES

If you find in favor of Plaintiff under Final Instruction No. 5 and find that Defendants would not have made the same employment decision were it not for consideration of Plaintiff's FMLA use, then you must award Plaintiff the amount of any wages, salary, and employment benefits Plaintiff would have earned in her employment with Defendants if the Defendants had not violated her rights under the Family Medical Leave Act, minus the amount of earnings and benefits from other employment received by Plaintiff during that time.

You are also instructed that Plaintiff had a duty under the law to mitigate her damages–that is, to exercise reasonable diligence under the circumstances to minimize her damages. Therefore, if you find by the greater weight of the evidence, that Plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to her, you must reduce damages by the amount of the wages and fringe benefits she reasonably would have earned if she had sought out or taken advantage of such an opportunity.

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.

FINAL INSTRUCTION NO. 12
GOOD FAITH

If you find in favor of Plaintiff under Instruction No. 5, then you must decide whether Defendants acted in good faith. Defendants bear the burden of establishing that they acted with subjective good faith and that they had an objectively reasonable belief that their conduct did not violate the law. The good faith requirement demands that Defendants establish that they honestly intended to ascertain the dictates of the FMLA and to act in conformance with it.

FINAL INSTRUCTION NO. 13
DUTY TO DELIBERATE

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case.

Dated this ___16th___ day of February, 2005

ROBERT W. PRATT
U.S. DISTRICT JUDGE